

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
January 13, 2009 Session

**TIMOTHY J. TURNER v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Rutherford County**  
**No. F-57493 James K. Clayton, Jr., Judge**

---

**No. M2008-00372-CCA-R3-PC - Filed May 1, 2009**

---

The Petitioner, Timothy J. Turner, was convicted upon a jury verdict of four counts of sexual battery and four counts of sexual battery by an authority figure. For reasons that were explored at the hearing on his petition for post-conviction relief, he did not appeal. Subsequent to the post-conviction hearing, the post-conviction court denied his petition. The Petitioner now appeals that decision, arguing that he received the ineffective assistance of counsel because trial counsel failed to: (1) request a mistrial or witness voir dire upon learning of possible tampering with sequestered witnesses; (2) hire an expert witness to rebut the expert testimony offered by the State; and (3) file a motion for a new trial on the Petitioner's behalf. After our review, we conclude that the Petitioner's trial counsel provided deficient representation because he failed to either file a motion for a new trial or a motion requesting withdrawal. We also conclude that the Petitioner was prejudiced by counsel's deficiency because the Petitioner was deprived of his right to a direct appeal. We accordingly grant the Petitioner a delayed direct appeal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part;  
Reversed in Part; Remanded for a Delayed Direct Appeal**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Darwin Colston, Murfreesboro, Tennessee, for the appellant, Timothy J. Turner.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; William Whitesell, District Attorney General; and Laural Hemenway, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

The Petitioner neither appealed his jury verdict conviction to this Court, nor included in the record of the instant post-conviction appeal a transcript of the trial record. As such, the only information we have regarding the underlying facts comes from the hearing on the Petitioner's petition for post-conviction relief.

It was established at that hearing that the Petitioner was charged with eight counts of rape, four counts of incest, and four counts of sexual battery by an authority figure as a result of certain contact he had with his daughter. He was convicted of four counts of sexual battery and four counts of sexual battery by an authority figure. His trial took place on October 12-14, 2004. He was sentenced on April 11 and May 16, 2005, and the trial judge entered judgment on June 21, 2005. No motion for a new trial was filed. There was no appeal from the judgments of the trial court.

The following exchange constitutes the only testimony regarding the Petitioner's claim that his trial counsel failed to request a mistrial upon a possible violation of the rule of sequestration:

[Petitioner's Post-Conviction Counsel]: All right. Now, as far as the trial itself, do you remember a point in the trial . . . where you called it to the [c]ourt's attention that somebody was – and I don't know who, because the transcript doesn't tell us – but somebody was going into the room where the sequestered witnesses were, in and out? Do you remember that?

[Petitioner's Trial Counsel]: I do not. That don't mean it didn't happen. I just don't remember.

[Petitioner's Post-Conviction Counsel]: Okay. But you don't remember bringing that to the [c]ourt's attention?

[Petitioner's Trial Counsel]: No, I don't.

[Petitioner's Post-Conviction Counsel]: Okay. And you don't remember asking for a mistrial or a voir dire of those witnesses or the person going in and out?

[Petitioner's Trial Counsel]: No.

Also at trial, the State apparently introduced testimony from the nurse that had examined the victim for evidence of sexual abuse; the nurse testified that she found no physical evidence of abuse, but that such a finding was not inconsistent with some form of abuse having occurred. At the Petitioner's post-conviction hearing, both the Petitioner and trial counsel testified that trial counsel did not call an expert for the purpose of rebutting the nurse's testimony that abuse may still have occurred, and that trial counsel did not discuss the possibility of doing so with the Petitioner. Trial counsel testified that he did not believe the nurse's testimony hurt the Petitioner's case.

Trial counsel further testified and introduced a February 7, 2005, letter communicating to the Petitioner that he was not interested in handling his appeal. The letter noted that trial counsel would normally charge \$10,000 to file a motion for a new trial and pursue an appeal, but that he would not handle the Petitioner's appeal even if the Petitioner were able to pay the \$10,000 fee. Trial counsel correctly advised the Petitioner that he would have thirty days after his sentencing hearing in which to file a motion for a new trial and that he could then appeal to this Court if the motion was unsuccessful. At his post-conviction hearing, however, the Petitioner testified that he expected trial counsel to file a motion for a new trial.

### **Analysis**

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462;

see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

#### **A. Failure to Request a Mistrial or Voir Dire**

Because the trial record is not before us, we have no evidence before us to substantiate the Petitioner's claim that someone may have tampered with sequestered witnesses, and no evidence that trial counsel failed to request a mistrial or conduct a witness voir dire upon discovering such possible tampering. The Petitioner's post-conviction counsel alluded to such an event when questioning trial counsel, who did not remember. The Petitioner himself said nothing about these events. Without evidence of these events, we cannot conclude that trial counsel's representation was either deficient or prejudicial to the Petitioner.

#### **B. Failure to Rebut the State's Expert Witness**

The Petitioner next argues that trial counsel should have called an expert witness to rebut the testimony offered by the nurse who examined the victim. "When a petitioner contends that trial counsel failed to . . . present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. As a general rule, this is the only way the petitioner can establish that . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Regardless of whether or not a petitioner's trial counsel was deficient, therefore, he is "not entitled to relief on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." Id. at 758.

The Petitioner did not present an expert witness at his post-conviction hearing to testify that a lack of physical evidence of sexual abuse is inconsistent with sexual abuse having occurred. As a result, we have no evidence before us that such an expert could have been found by reasonable investigation or would have testified in the Petitioner's favor. Also, as we have stated, the record from the Petitioner's trial is not before us. Accordingly, we conclude that the Petitioner cannot demonstrate that trial counsel's failure to call an expert rebuttal witness prejudiced him. The Petitioner has not shown that he is entitled to relief on this issue.

### **C. Failure to File Motion for a New Trial**

In Wallace v. State, 121 S.W.3d 652 (Tenn. 2003), our supreme court held that trial counsel for a defendant who wishes to appeal must either file a timely motion for a new trial or file a motion to withdraw as counsel so as to allow the defendant to file a pro se motion. Id. at 658. Failure to do so constitutes deficient performance and is “presumptively prejudicial.” Id. The supreme court cited as support for this view Tennessee Rule of Criminal Procedure 37(e)’s requirement that “[a]n attorney retained by the defendant to represent the defendant for the trial but not for appeal, shall timely advise the trial court of this fact at the hearing on the motion for a new trial. Thereupon, such counsel will be permitted to withdraw as counsel of record, except as provided in Rule 37(e)(2).” To prevail, “a petitioner in a post-conviction proceeding must establish that he or she intended to file a motion for new trial and that but for the deficient representation of counsel, a motion for new trial would have been filed raising issues in addition to sufficiency of the evidence.” Wallace, 121 S.W.3d at 659.

It appears to be undisputed that no motion for a new trial was filed in the Petitioner’s case. Although trial counsel’s February 7, 2005 letter to the Petitioner notes trial counsel’s unwillingness to handle the Petitioner’s appeal, we have no evidence that trial counsel ever moved to be allowed to withdraw as the Petitioner’s counsel. As such, trial counsel’s performance was presumptively deficient.

We also conclude that the Petitioner would have filed a motion for a new trial but for trial counsel’s deficient representation. As evidenced by an undated letter sent from the Petitioner to trial counsel some time between February 7, 2005 and July 19, 2005, the Petitioner remained uncertain whether trial counsel continued to represent him after his sentencing hearing. Although trial counsel’s February 7, 2005 letter attempted to allay any confusion by telling the Petitioner he would “have to appeal on [his] own,” the letter does not clearly communicate that trial counsel, by expressing his unwillingness to handle the Petitioner’s “appeal,” intended to foreclose any possibility of handling both the Petitioner’s direct appeal and his motion for a new trial. We cannot conclude that the Petitioner, a man lacking any legal training, understood the letter as trial counsel evidently intended him to. As such, we are persuaded that the Petitioner continued to believe, until he received trial counsel’s July 19, 2005, letter informing him that he had been “released as a client,” that trial counsel would handle his motion for a new trial. At that time the Petitioner was in jail, and only two days remained in which he could have filed a motion for a new trial.

Because of the lack of a trial transcript in the record, we cannot speculate as to the merits of the Petitioner’s other arguments if they were to be presented on direct appeal. We are persuaded, however, that the Petitioner would raise on direct appeal issues other than sufficiency of the evidence.

Because his trial counsel was deficient and prejudiced him, the Petitioner is entitled to relief. A delayed direct appeal is the proper remedy for the failure to file a motion for new trial. Id. at 660. Tennessee Code Annotated section 40-30-113(a)(3) states that a trial judge who “finds that the petitioner was denied the right to appeal from the original conviction in violation of the Constitution

of the United States or the Constitution of Tennessee and that there is an adequate record of the original trial proceeding available for review” can, when no motion for a new trial was filed in the original proceeding, “authorize a motion to be made before the original trial court within thirty (30) days.” Tenn. Code Ann. § 40-30-113(a)(3).

Tennessee Rule of Appellate Procedure 3(b) grants a convicted defendant an appeal as of right to this court. As to the grant of a delayed appeal, Rule 28, §9(D)(2)(a) of the Rules of the Tennessee Supreme Court states that “[i]f the trial court determines that the petitioner was not deprived of the right to appeal pursuant to T.R.A.P. 3, this ruling may be challenged as part of any Rule 3 appeal from the trial court’s judgment in the post-conviction proceedings,” the challenge of which the Petitioner has availed himself here. “[This Court] shall consider and resolve this issue along with any other issues raised in the post-conviction appeal.” Tenn. Sup. Ct. R. 28, §9(D)(2)(a). In the event that this Court grants a delayed appeal, “the post-conviction appeal shall not be stayed; instead, any party may challenge this decision of [this Court], or any portion thereof, by filing an application for permission to appeal pursuant to T.R.A.P. 11.” Id.

Having also resolved the other issues raised in this post-conviction appeal, we therefore remand this case to the Circuit Court for Rutherford County and direct the trial court to enter an order authorizing the Petitioner to file a motion for a new trial. Thereafter, the Petitioner may proceed with a delayed direct appeal in accordance with the Tennessee Rules of Appellate Procedure.

### **Conclusion**

Based on the foregoing authorities and reasoning, we affirm the judgment of the post-conviction court denying the Petitioner a new trial. We grant the Petitioner a delayed direct appeal.

---

DAVID H. WELLES, JUDGE